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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. LEEDRUE MALCOLM OVERSTREET, JR., et al., Defendants and Respondents.	E069373 (Super.Ct.No. RIF1601108) OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge. Affirmed.

Michael A. Hestrin, District Attorney, Kirsten E. Seebart, Deputy District Attorney for Plaintiff and Appellant.

Steven L. Harmon, Public Defender, William A. Meronek, Deputy Public Defender for Defendants and Respondents.

Defendants and respondents Leedrue Malcolm Overstreet, Jr. (Overstreet) and Chris Anthony Davis (Davis) (collectively, defendants) petitioned the trial court for resentencing pursuant to Proposition 64, the Control Regulate and Tax Adult Use of Marijuana Act. (Health & Saf. Code, § 11361.8, subd. (a).) The trial court granted defendants' petitions and resentenced defendants. The People contend the trial court erred by granting the petitions because (1) defendants' offense could qualify as a felony if committed post-Proposition 64; and (2) the trial court failed to make a dangerousness finding. We affirm the order.

FACTUAL AND PROCEDURAL HISTORY

A. CONVICTIONS

On March 8, 2016, the People charged defendants with possessing marijuana for sale (Health & Saf. Code, § 11359; Count 1). The crime was alleged to have occurred on October 21, 2015. The People further alleged defendants were armed with a firearm (Pen. Code, § 12022, subd. (a)(1))[1] and committed the offense in association with a criminal street gang (§ 186.22, subd. (b)(1)(A)). The People also charged defendants with actively participating in a criminal street gang (§ 186.22, subd. (a); Count 2); and with resisting arrest (§ 148, subd. (a)(1); Count 3).

On September 2, 2016, Overstreet pled guilty to Count 1, including the firearm and gang enhancements. On October 3, Davis pled guilty to Count 1, including the firearm and gang enhancements, and to an amended Count 4, which concerned resisting

[1] All subsequent statutory references will be to the Penal Code, unless otherwise indicated.

arrest on August 19, 2016 (§ 148, subd. (a)(1)). Also on October 3, the trial court granted defendants formal probation for a period of 36 months with the condition they serve 365 days in the custody of the Riverside County Sheriff's Department.

B. PETITIONS

On February 3, 2017, defendants petitioned the trial court to resentence them for the marijuana convictions, pursuant to Proposition 64. (Health & Saf. Code, § 11361.8.) The People opposed the petitions. The People asserted defendants were ineligible for resentencing due to the firearm and gang enhancements associated with the marijuana convictions. The People asserted Proposition 64 reduced non-violent marijuana offenses to misdemeanors, but possession of a firearm by gang members caused defendants' marijuana offense to be violent.

Alternatively, the People asserted that if the trial court granted defendants' petitions, then it should amend defendants' gang enhancements to cite section 186.22 subdivision (d), rather than subdivision (b), because subdivision (d) provides for an alternate sentencing scheme. The People asserted there were no due process issues with amending the enhancements because subdivisions (b) and (d) involve the same elements; the difference, according to the People, was that subdivision (b) applied to felonies, while subdivision (d) applied to misdemeanors.

The trial court held a hearing on defendants' petitions. Defendants argued that Proposition 64 provided for Health and Safety Code section 11359 convictions to be reduced from felonies to misdemeanors, and defendants "are clearly eligible" for that

relief. Defendants asserted the enhancements would "drop off" once the substantive offense was reduced to a misdemeanor.

The People argued that the firearm and gang enhancements caused defendants' convictions to be violent felonies, and thus caused them to be ineligible for relief. The trial court said that if defendants were charged with marijuana possession post-Proposition 64, then the firearm enhancement could not be charged, and therefore, given the crimes with which the defendants could currently be charged, defendants qualified for relief. The trial court then permitted the People to modify the gang enhancement plea to reflect subdivision (d), rather than subdivision (b), which made the marijuana offense a wobbler. The trial court decided that with the modification, it would still treat defendants' offense as a misdemeanor. The trial court resentenced defendants, granting them summary probation.

DISCUSSION

A. PEOPLE'S BRIEF

The People's brief lacks clarity. The People present a broad and generic contention that, under the post-Proposition 64 laws, defendants' offense would be charged as a wobbler pursuant to section 186.22, subdivision (d), and that voters intended for such acts to be felonies. It is unclear how, exactly, the People intend for this idea to connect with the instant case.

We have interpreted the People's contention in three ways: (1) Because the section 186.22, subdivision (d), modification was made at the Proposition 64 hearing, the trial court erred by granting defendants' petitions; (2) because defendants could have

been convicted with a true finding on a section 186.22, subdivision (d), allegation, the trial court erred by granting defendants' petitions; and (3) the trial court erred by granting defendants' petitions because the electorate did not intend for marijuana convictions, which have associated firearm and gang enhancements, to be reduced to misdemeanors. For the sake of thoroughness, we will address the three different interpretations of the People's contention.

B. MODIFIED CONVICTION

1. *HEALTH AND SAFETY CODE SECTION 11361.8*

Health and Safety Code section 11361.8, subdivision (a), provides, "A person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing"

2. *SECTION 186.22, SUBDIVISION (D)*

In 2015, section 186.22, subdivision (d), provided, "Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two, or three years, provided that any person

sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail."

Section 186.22, subdivision (d), sets forth an alternate sentencing scheme. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.) "[W]hen a crime would otherwise be a straight misdemeanor, section 186.22(d) elevates it to a wobbler." (*People v. Sweeney* (2016) 4 Cal.App.5th 295, 301 (*Sweeney*).)

3. *CONTENTION*

The People contend the trial court erred by granting defendants' petitions because defendants failed to show they "*would* have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense." (Health & Saf. Code, § 11361.8, subd. (a), italics added.) The People assert that defendants' pleas were modified to include Penal Code section 186.22, subdivision (d), and therefore, their crime was a wobbler and would not necessarily have been a misdemeanor.[2]

[2] Defendants contend the trial court erred by permitting the People to substitute the alternate sentencing scheme (§ 186.22, subd. (d)) for the gang enhancement (§ 186.22, subd. (b)). Defendants request this court "vacate the order allowing [the People] to retroactively amend [defendants'] admissions." "A respondent who fails to file a cross-appeal cannot urge error on appeal." (*Kardly v. State Farm Mut. Auto Ins.*

4. *ANALYSIS*

We apply the de novo standard of review. (*People v. Superior Court* (*Martinez*) (2014) 225 Cal.App.4th 979, 990.) The People's argument fails on the basis of procedure, in particular the timing aspect is problematic. The People's contention, if correct, would work as follows: First, a defendant makes a showing that his section 11359 offense is now a misdemeanor. (Health & Saf. Code, § 11361.8, subd. (a).) Second, the trial court finds the defendant has made the required showing. Third, the People request permission to modify the section 186.22, subdivision (b), enhancement to section 186.22, subdivision (d), due to the finding that defendant's offense qualifies as a misdemeanor. Fourth, the trial court permits the modification.

The fifth step is the problem in this case. The prosecution is asserting that a defendant must, again, show under the modified plea that his offense would have been a misdemeanor had Proposition 64 been in effect at the time of the crime. (Health & Saf. Code, § 11361.8, subd. (a).) The problem is that defendants already made that showing in step one. In this case, defendants made their required showing, as found by the trial court (Health & Saf. Code, § 11361.8, subd. (a)); they are not required to make the showing a second time.

Accordingly, the People's contention that defendants cannot show their modified offense would have been a lesser offense in 2015 is a purely academic issue because,

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Co. (1995) 31 Cal.App.4th 1746, 1748, fn. 1.) Defendants did not file a cross-appeal. Accordingly, we decline to review the issue of whether the trial court erred by permitting the People to modify defendants' admissions after defendants' pleas.

prior to the modification, the trial court found defendants met their burden. The defendants have one finding in their favor on the issue of whether their offense would have been a misdemeanor in 2015—they are not required to have two findings in their favor.

The People request this court reconsider its holding in *Sweeney, supra*, 4 Cal.App.5th 295, which is a Proposition 47 case (§ 1170.18). In *Sweeney*, two of the defendant's felonies included gang enhancements (§ 186.22, subd. (b)). (*Sweeney*, at p. 297.) The People argued that the defendant's crimes did not qualify for Proposition 47 relief because, if the defendant's crimes were committed post-Proposition 47, then the People would have charged the defendant under the alternate sentencing provision of section 186.22, subdivision (d), rather than the enhancement provision of section 186.22, subdivision (b). The People argued that because section 186.22, subdivision (d) would have made the defendant's offenses wobblers, rather than straight misdemeanors, he did not qualify for Proposition 47 relief. (*Sweeney*, at p. 300-301.)

In regard to that argument, this court wrote, "As a matter of due process, an alternative punishment provision must be pleaded and proved. . . . [S]ection 186.22(b) and section 186.22(d) are mutually exclusive; a defendant who receives an elevated sentence under section 186.22(d) cannot also be punished with an enhancement under section 186.22(b), or vice versa. [Citations.] Accordingly, the information alleging gang enhancements under section 186.22(b) did not give defendant adequate notice that section 186.22(d) might apply." (*Sweeney, supra*, 4 Cal.App.5th at p. 301.)

It is unclear on what basis the People want this court to revisit *Sweeney*. In the instant case, the trial court permitted the People's modification of defendants' guilty pleas from the gang enhancement (§ 186.22, subd. (b)) to the alternate sentencing provision (§ 186.22, subd. (d)). The People do not assert the modification was an error. Defendants assert the modification was an error, but defendants failed to file a cross-appeal. (*Kardly v. State Farm Mut. Auto Ins. Co.*, *supra*, 31 Cal.App.4th at p. 1748, fn. 1 ["A respondent who fails to file a cross-appeal cannot urge error on appeal"].) Because there is no due process argument properly before us regarding the modification of the gang enhancements, we decline to revisit *Sweeney*.

C. OTHER CHARGES

The People contend the trial court erred by finding defendants' offense would have been a misdemeanor in 2015 if Proposition 64 had been in effect at that time, because, under the post-Proposition 64 laws, the People would have charged defendants with wobblers/felonies by utilizing section 186.22, subdivision (d).

In evaluating a Proposition 64 petition, the trial court must focus on the crime with which the defendant was actually convicted—not the variety of crimes that could have been, but were not, charged. The People's premise appears to be that, in order for a defendant to show that he would have been convicted of a lesser crime, he must disprove any felony, charged or uncharged, that could arguably be supported by the facts. Health and Safety Code section 11361.8, subdivision (a), discusses "a conviction," i.e., that a misdemeanor conviction would have occurred. The subdivision does not contemplate theoretical *charges* that could have been, but were not, brought.

The People fail to explain how a defendant moving for resentencing, who must show that his conviction would have been for a lesser offense, could anticipate every felony the People might try to argue could apply to the facts of the case. Because of defendants' guilty pleas, defendants have convictions for violating Health and Safety Code section 11359, which is a conviction eligible for resentencing under Health and Safety Code section 11361.8, subdivision (a). Nothing in Health and Safety Code section 11361.8, subdivision (a), requires a defendant to disprove every possible felony with which he could have been charged. (See *People v. Abarca* (2016) 2 Cal.App.5th 475, 484 [Proposition 47 "does not require a petitioner to examine the Penal Code for other offenses his conduct would have supported and prove he would not have been convicted of those in addition"].)

In sum, the assertion that defendants could have been charged under Penal Code section 186.22, subdivision (d), is not persuasive because the trial court must focus on the conviction when analyzing a defendant's petition—not on theoretical charges. (Health & Saf. Code, § 11361.8, subd. (a).)

D. *VOTERS' INTENT*

The People contend the trial court erred by granting the petition because voters did not intend for crimes involving gang members and a firearm to be reduced to a misdemeanor.

"In interpreting a voter initiative, we apply the same principles that govern our construction of a statute. [Citation.] We turn first to the statutory language, giving the words their ordinary meaning. [Citation.] If the statutory language is not ambiguous,

then the plain meaning of the language governs. [Citation.] If, however, the statutory language lacks clarity, we may resort to extrinsic sources, including the analyses and arguments contained in the official ballot pamphlet, and the ostensible objects to be achieved." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)

The People do not assert what language in the statute is unclear. However, the People assert information in the ballot pamphlet supports a conclusion that voters did not intend for a crime involving gang members and a firearm to be a misdemeanor. We cannot reach the ballot pamphlet language until we have concluded the statutory language is ambiguous.

The plain statutory language provides that a person who is "serving a sentence for a conviction . . . who would have been guilty of a lesser offense" under Proposition 64, if those laws had "been in effect at the time of the offense may petition for . . . resentencing . . . in accordance with [Health and Safety Code s[ections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act." (Health & Saf. Code, § 11361.8, subd. (a).)

There is nothing obvious in the statutory language creating an ambiguity, such that it is unclear if the electorate wanted enhancements to be considered along with the enumerated substantive offenses. Because there is a list of substantive offenses in the statute, it appears the trial court is meant to consider the substantive offense. Because there is no mention of enhancements, it appears the trial court is not meant to consider enhancements. Within the statute, we see no exception for gang-related offenses.

(Health & Saf. Code, § 11361.8.) We do not see an ambiguity regarding enhancements in the plain language of subdivision (a).

Health and Safety Code section 11361.8, subdivision (b), provides, "Upon receiving a petition under subdivision (a), the court shall presume the petitioner satisfies the criteria in subdivision (a) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety."

Because the language does not mention enhancements or vaguely reference enhancements, we see no ambiguity regarding whether a court should consider enhancements when determining whether a petitioner meets the criteria for resentencing. Accordingly, because we see no ambiguity in the plain language of the statute, we need not analyze the ballot pamphlet.

E. DANGEROUSNESS

The trial court did not comment on the issue of dangerousness. The People contend the trial court erred by not considering whether defendants pose an unreasonable risk of danger to public safety.

The law provides that if a petitioner's crime would have been a misdemeanor, then the court shall grant the resentencing petition "unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety." (Health & Saf. Code, § 11361.8.) It is the People's burden to present evidence of the

unreasonable risk of danger a defendant poses to public safety. (See *People v. Buford* (2016) 4 Cal.App.5th 886, 899 [prosecution bears the burden of proof on dangerousness in Proposition 36 cases]; see also *People v. Jefferson* (2016) 1 Cal.App.5th 235, 240-241 [prosecution bears the burden of proof on dangerousness in Proposition 47 cases].)

In the instant case, on the People's form responses to defendants' petitions, the People did not mark the box indicating a hearing should be held regarding whether defendants pose a risk of danger to public safety. In the People's written points and authorities, the People did not argue that defendants pose a risk of danger to public safety. At the hearing on defendants' petitions, the People did not argue that defendants pose a risk of danger to public safety. After the trial court found that defendants' offense qualified as a misdemeanor, the People did not ask to be heard on the issue of dangerousness. Rather, the People asked, "[E]ven though they have been resentenced as a misdemeanor, they remain on probation[?]"

Because the People did not raise the issue of dangerousness in the trial court, they have forfeited the issue on appeal. The People needed to raise the issue in the trial court, and offer evidence or make an offer of proof, prior to raising the issue in this court. (See *People v. Clark* (2016) 63 Cal.4th 522, 584 [Evidence Code section 352 issue forfeited on appeal due to failure to raise it in the trial court]; see also *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218 [objection to a probation condition must be raised in the trial court in order to argue the issue on appeal].)

DISPOSITION

The order is affirmed.

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MILLER
Acting P. J.

We concur:

SLOUGH
J.

RAPHAEL
J.